

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting
(Chapter VIII, Rule 32 (2) (b))
Description of Case

Special Appeal No. 63 of 2006

Date of decision:-02.12.2006

A.F.R. (Approved for Reporting)

Not approved for reporting

Date :- 02.12.2006

Initials of Judge

Note:- Bench Reader will attach this at the top of the first page of the Judgment when it is put up before the judge for signature.

HIGH COURT OF UTTARANCHAL ,AT NAINITAL

Special Appeal No. 63 of 2006

1. State of Uttaranchal Secretary, Public Works Department,
Govt. of Uttaranchal, Dehradun.
2. Executive Engineer, Construction Division, Public
Works Department , Narendra Nagar, District Tehri
Garhwal.

... Appellants

Versus

Mrs. Mangali Devi widow of
Late Shri Govind Singh Rana,
Resident of Village Ranikhet,
Post Office Kirtinagar, district
Tehri Garhwal

... Respondent

Delievery of Judgment:- 02nd December, 2006

Mr.N.C. Gupta learned standing Counsel for the appellants.
Mr. C.D. Bahuguna learned counsel for the respondent .

Coram: Hon'ble Rajeev Gupta, C.J.

Hon'ble J.C.S. Rawat, J.

Per Hon'ble J.C.S. Rawat, J.

1. This special appeal under Rule 5 Chapter VIII of the High Court Rules has been filed against the judgment and order dated 06.12.2003 passed by the learned Single Judge of this Court in Writ Petition No. 2726(S/S)2001 Mrs. Mangali Devi Vs. State of Uttaranchal & others, whereby the learned Single Judge has allowed the petition and directed the authority concerned to consider the appointment of the petitioner's son under the Dying -in- Harness Rules, 1974 (hereinafter referred as 1974 Rules). The learned Single Judge has also directed to pay the pension, gratuity and salary of the deceased.

2. A writ petition bearing No. 27726/2001(S/S) was filed before the learned Single Judge by the petitioner- Mrs. Mangali Devi for the following reliefs:-

(a) Issue a writ, order or direction in the nature of mandamus commanding the respondents to appoint the son of the petitioner under Dying in Harness Rules and to pay the petitioner back salary, pension and gratuity with interest within the time allowed by this Hon'ble Court.

(b) Issue any other suitable writ order a direction which this Hon'ble Court may deem fit and proper.

(c) Award cost of the petition to the petitioner.

3. The husband of the petitioner late Sri Govind Singh Rana was Working under the Executive Engineer, Construction Division, Public Works Department Narendra Nagar, Tehri Garhwal on the post of Beldar on daily wage basis since 1977 and he worked as daily wage employee upto the year 1979. Thereafter the husband of the petitioner was taken as work charge employee on the post of Beldar since 1980 and he worked upto 05.06.1993. Thus, the husband of the petitioner worked for about a period of 16 years. The husband of the petitioner died on 05.06.1993 leaving behind the heirs and legal representatives, namely, Mrs. Mangala Devi (Widow) and four sons Gabar Singh, Jaspal Singh, Shishpal Singh and Diggpal Singh. It was further alleged in the petition that the Executive Engineer, PWD had prepared a seniority list of work charge employees fin the year 1992 in which the name of the deceased - Govind Singh Rana finds place at serial no.10. One - Trilok Singh was engaged in Musterroll in the construction division, PWD Narendra Nagar, District

Tehri Garhwal in the year 1984 and he was then engaged on work charge basis in the year 1989. After the death of Trilok Singh, his son was given compassionate appointment. The petitioner had further alleged that one - Harsh Mani was also appointed on daily wage basis in the year 1973 and he was taken on work charge in the year 1989. he died in the year 1993 and his son was given the compassionate appointment. The petitioner had filed the representation before the authority concerned that her elder son is also covered under the G.O. dated 16.03.1996 which provides that the work charge employee who died in service and had completed 10 years of service his dependant may be given compassionate appointment. When no heed was paid to the request of the petitioner, she filed a petition before the consumer Forum on which the Consumer Forum vide order dated 15.07.1995 allowed the petition. Feeling aggrieved by the order, the department went up in appeal before the State consumer Forum, U.P., Lucknow. The State Consumer Forum vide order dated 21.07.2000 allowed the appeal holding that the remedy of the petitioner filed the writ petition before the U.P., Public Service Tribunal. Feeling aggrieved by this, the petitioner filed the writ petition before the Court.

4. The counter affidavit was filed by the respondents against the writ petition admitting therein that the husband of the petitioner was serving in the work charge establishment. it was further alleged that the contents of petition with regard to Trilok Singh are wrong because Sri Trilok Singh was a regular employee and as such his son was given compassionate appointment. It was further alleged that the petitioner has wrongly stated in the petition that after the death of Harsh Mani, his son was given employment under the

die-in-harness. Harsh Mani is alive and is still working in the department.

5. After hearing the parties, the learned Single Judge had allowed the petition vide order dated 06.12.2003 and directed to the authority concerned to pay the pension, gratuity and salary of the deceased and to consider the appoint petitioner's son under the 1974 Rules.

6. Feeling aggrieved by the said order, the present special appeal has been preferred by the appellants-State of Uttaranchal & others.

7. Heard learned counsel for the parties and perused the record.

8. Learned counsel for the appellants contended that the husband of the petitioner was not a regular employee. The deceased-Govind Singh Rana was only a work charge employee in the department. The irregular work charge employees are not covered under Rule 5 of the 1974 Rules and no compassionate appointment can be claimed by them. Learned counsel for the petitioner refuted the contention and contended that the husband of the petitioner had been working on the post of Beldar on daily wages since 1977 and he worked as a daily wage employee upto 1979 and thereafter her husband was taken an work charge employee on the post of Beldar since 1980 and he died in the year 1993. In this way, the husband of the petitioner had worked for a period of 16years in the department. Therefore, the son of the deceased is entitled to get compassionate appointment.

9. Rule 5 of the U.P. Recruitment of Dependants of Government Servant Dying in Harness Rules, 1974 provides as under:-

"5. Recruitment of a member of the family of the deceased. (1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person-

i) fulfils the educational qualifications prescribed for the post,

ii) is otherwise qualified for Government service, and

iii) makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner."

10. Rule 5 provides that the compassionate appointment can be given to the dependent of the Government servant. Now, we will have to see who is the Government servant under 1974 Rules.

11. The Government servant has been defined under Rule 2 of the 1974 Rules as follows:-

"2. Definitions.- In these rules, unless the context otherwise requires.

(a) Government means the Governments of Uttar Pradesh;

(b) "Government servant" means a person appointed to public services and posts in

connection with the affairs of the State of Uttar Pradesh.

Explanation.- A Government servant whose services are placed at the disposal of a company, a corporation, an organization, a local authority, the Central Government or the Government of another State by the U.P. Government, shall, for the purposes of these rules, be deemed to be a Government servant notwithstanding that this salary is drawn from the source other than the Consolidated Fund of Uttar Pradesh.

12. The husband of the petitioner was not regularly appointed employee of the department and he was only a workcharge employee in the department. He worked in the department for 16 years. Rule 2(a)(iii) of 1974 Rules also provides that he must have three years continuous service in regular vacancy in such employment. Now, it has to be seen whether the husband of the petitioner was working in regular vacancy for a period of continuous three years. The petitioner had only pleaded in her petition that her husband-Govind Singh Rana was working under the Executive Engineer, Construction Division, Public Works Department Narendra Nagar, Tehri Garhwal on the post of Beldar on daily wage basis since 1977 and he worked as daily wage employee upto the year 1979. Thereafter, he was taken as work charge employee on the post of Beldar since 1980 and he worked upto 05.06.1993. The petitioner had not pleaded in her petition that her husband had been working continuously for the last three years in the department *against the regular* vacancy. Learned counsel for the petitioner could not

demonstrate us that her husband had put three years of continuous service *against a regular vacancy*. As such, the petitioner's husband cannot be said to be a Government Servant under Rule 2 (a) (iii) of 1974 Rules and the son of the deceased is not entitled to get the benefit of Rule 5.

13. Learned counsel for the appellants contended that the Government Orders referred in the impugned Judgment of the learned Single Judge are not applicable in this case. Learned counsel for the appellant further contended that these G.O.s are merely an executive order and the said G.O.s do not confer any right upon the petitioner to enforce the said orders . It was further contended that these Government Orders had been issued as guidelines to their officers in the appropriate cases. Learned counsel for the petitioner refuted the contention and contended that the Government Orders referred the impugned judgment are applicable in this case and the petitioner is entitled for the Compassionate appointment. Perusal of the said Government Orders reveals that these orders had been issued only as directions to their officers. It is well settled position of law that the executive orders or the instructions, even if issued by the State Government , would not meet the requirement of law and cannot prevail over the statutory rules framed under the provisions of Article 309 of the Constitution of India. The State is under the obligation to make appointments only in fulfillment of its Constitutional obligation, not by way of any executive instructions. The Dying in Harness Rules, 1974 had been framed by the State Government under Article 309 of the Constitution of India. The appellants are under bounden duty to make the compassionate appointments only in fulfillment of the requirement of the 1974 Rules

framed under Article 309 of the Constitution of India. The administrative orders of the Government would not meet the requirements of law as these orders cannot prevail over a statute or the statutory rules framed under the provisions of the article 309 of the Constitution of India. The Rules which had been framed under Article 309 confer a right to get it enforced by a court of law only after fulfillment of the requirement of the said Rule. The executive orders which had been referred in the impugned judgment of the learned Single Judge are contra to the Rules framed by the State Government under Article 309 of the Constitution of India. Thus, these orders being contra to the constitutional provisions would not confer any right upon the petitioner to enforce the said orders by the court. Thus, the petitioner is not entitled to get the benefit of the Government Orders issued time to time for the compassionate appointment of daily wages. Learned Single Judge fell in error by holding that the said Government Orders confer an enforceable right upon the petitioner before a court of law.

14. Learned counsel for the appellant further contended that the husband of the petitioner died in the year 1993. Thereafter, an application has been filed for compassionate appointment and the same was rejected by the department on 22.08.1993. A period of 13 years have been elapsed from the date of death of the deceased and there is no need of compassionate appointment as the family of the deceased had survived for a period of 13 years without compassionate appointment. The petitioner refuted the contention and contended that her husband died in the year 1993 and thereafter the family of the petitioner was in distress. The petitioner filed a petition before the Consumer

Forum on which the consumer forum vide order dated 15.07.1995 allowed the petition . Feeling aggrieved by this, the department preferred an appeal before the State Consumer Forum, U.P., Lucknow. The State Consumer Forum vide order dated 21.07.2000 allowed the appeal holding that the remedy of the petitioner is to file claim petition before the U.P. Public Service Tribunal. Thereafter, the petitioner filed the writ petition before this court. It is true that the petitioner has been prosecuting her claim for a long time. But , at the same time, this fact cannot be denied that the family of the petitioner had survived for a period of 13 years. It is pertinent to mention here that the appointment in public services on compassionate ground has been carved out as an exception, in the interest of justice, to the general rule that appointments in the public services should be made strictly on the basis of open invitation of applications and merit and no other mode of appointments nor any other consideration is permissible. A compassionate appointment is made out of pure humanitarian consideration on account of the fact that unless some source of livelihood is provided the family would not be able to make both ends meet. The whole object of granting such appointment is to enable the family to tide over the sudden crisis . it is also well settled position of law that an appointment on compassionate ground has to be given in accordance with the relevant rules and guidelines that have been framed by the authority concerned and no person can claim appointment on compassionate grounds in disregard of such rules or guidelines.

15. The Apex Court, in the case of **Umesh Kumar Nagpal Vs. State of Haryana 1994 (4) SCC P/138**, held in para 2:-

"2.....The whole object granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lower posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favorable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., relief against destitution."

16. In **State of J&K & others Vs. Sajad Ahmed Mir 2006 (5) SCC 766**, the Hon'ble Supreme Court has held that the compassionate appointment is an exception to the general rule. Normally, an employment in the Government or other public sectors should be open to all eligible candidates who can come forward to apply and compete with each other. It is in consonance with Article 14 of the Constitution. On the basis of competitive merits, an appointment should be made to public office. This general rule should not be departed from except where compelling circumstances demand, such as, death of the sole breadwinner and likelihood of the family suffering because of the setback. Once, it is proved that inspite of the death of the breadwinner, the

family survived and substantial period is over, there is no necessity to say "goodbye" to the normal rule of appointment and to show favour to one at the cost of the interests of several others ignoring the mandate of Article 14 of the Constitution. Keeping in view of this, the petitioner is not entitled for relief on this ground also.

17. The petitioner further submits that some of the work charge employees, who were appointed after the appointment of the petitioner's husband and they died during the course of employment, the benefit of compassionate appointments were given to their dependants. Learned counsel for the appellant refuted the contention. The appellant had also alleged in the counter affidavit that Trilok Singh was a regular employee of the department, therefore , after the death of Trilok Singh his son was given compassionate appointment. But the husband of the petitioner was not a regular employee. It was further alleged in the counter affidavit that Harsh Mani is alive and is still working in the department . There is no rebuttal on this point on behalf of the petitioner. The petitioner had also alleged that the services of Trilok Singh had been regularized. Thus, there was no bar to appoint his son under die-in-harness. It is established from the record that the department had not provided the compassionate appointment to any of the dependent of the daily wager. However, for the sake of arguments, it is assumed that some dependants of daily wage employees have been provided compassionate appointment illegally, such illegal appointments would not confer an enforceable right upon the petitioner to appoint her son on compassionate ground. If any illegality has been committed in past by the department,

such illegality cannot be allowed to repeat in future and to perpetuate it . The Hon'ble Supreme Court has held in the **State of U.P vs. Neeraj Awasthi, (2006) 1 SCC 667** as follows:-

"75. The fact that all appointments have been made without following the procedure, or services of some persons appointed have been regularized in the past, in our opinion, cannot be said to be a normal mode which must receive the seal of the court. Past practice is not always the best practice . if illegality has been committed in the past, it is beyond comprehension as to how such illegality can be allowed to perpetuate. The State and the Board were bound to take steps in accordance with law. Even in this behalf Article 14 of the Constitution will have no application. Article 14 has a positive concept. No equality can be claimed in illegality is now well settled."

Therefore, the argument advanced by the learned counsel for the petitioner is not tenable.

18. It was further contended by the learned counsel for the petitioner that Trilok Singh, who was engaged after the engagement of the petitioner's husband, was regularized in the service, but the husband of the petitioner was not regularized and he died as a daily wager. It was further contended that the department should have regularized the husband of the petitioner prior to Trilok Singh as the husband of the petitioner was senior to Trilok Singh . Thus , the act of the department was illegal and discriminatory. It was further contended that the petitioner's husband shall be deemed to have been regularized. Learned counsel for the appellant refuted the contentions. Perusal of the record reveals.

that the petitioner's husband was a daily wage employee till he died. A daily wage employee had no enforceable right to be absorbed in service. Thus, it cannot be held that the service of the petitioner's husband would be deemed to have been regularized. A daily wage employee cannot be held regularized till the order of regularization had been passed by the competent authority under the Rules framed under the Constitution of India.

19. It is well settled position of law that it is not open to the High Court to exercise its discretion under Article 226 of the Constitution of India to issue mandamus directing the State or its instrumentalities to regularize the service of adhoc/daily wage/casual employees who had not been appointed by following the due procedure. A mandamus can not be issued in favour of the employees directing the Government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent . The husband of the petitioner had no enforceable right to seek his absorption in the department. It has been held by the Hon'ble Supreme Court in **Secretary, State of Karnataka Vs. Umadevi** **2006 AIR SCW p/1991** that:-

"43. Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in Rai Shivendra Bhadur (Dr.) v. Governing Body of the Nalanda College. That Case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus

may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the Government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent."

20. In the **State of Haryana & others Vs. Rani Devi & another 1996(5) SCC 308**, it has been held that the High Court should not direct the authorities to appoint the claimant on compassionate ground when admittedly the deceased was working as apprentice for a limited period. If the scheme regarding appointment on compassionate ground is extended to all sorts of casual, adhoc employees including those who are working as Apprentices, then such scheme cannot be justified on constitutional grounds. It need not be pointed out that appointments on compassionate grounds are made as a matter of course, without even requiring the person concerned to face any selection committee. In the case in hand, the petitioner's husband was appointed on daily wages. He had no right to be absorbed in the regular service. He had not worked for three years continuously against a regular vacancy. Therefore, the petitioner's son was not entitled to be appointed on compassionate ground. Merely being a dependent of an ex-employee would not be entitled to seek appointment on compassionate grounds. The court cannot grant any relaxation for the same. The court cannot provide appointment under die-in-harness. The right to be appointed on compassionate ground cannot be claimed as a right of heritance irrespective of the nature of service rendered by the deceased. Such appointments

on compassionate ground have to be made in accordance with Rules, Regulations taking into consideration the financial condition of the family of the deceased.

21. It is well settled position of law that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of daily wage employees who by the very nature of their appointments, do not acquire any right. In view of the above, we do not find any substance in the argument advanced by learned counsel for the petitioner.

22. According to the Dying in Harness Rules, 1974, the employment is to be provided on a post in relaxation of normal recruitment rules if such person fulfills the prescribed qualification. Thus the provisions clearly provide that there must be some vacancy was available at the time of the appointment. The petitioner had not alleged in her petition that a vacancy was available at the time of the submission of the application to the competent authority. The appointment under the Dying in Harness Rules, 1974 being an exception to the general rule of the appointments to be made by due process, the Courts should not direct compassionate appointment as a matter of course without strict adherence of the rules. It was further submitted on behalf of the petitioner that even if no post was

available for appointment under die-in-harness, the competent authority should have provided employment by creating a supernumerary post on compassionate ground. Learned Counsel for the appellants refuted the contention.

23. The Apex Court in the case of **Umesh Kumar Nagpal (supra)** has held in para 4 :-

"4. It is for these reasons that we have not been in a position to appreciate judgments of some of the High Courts which have justified and even directed compassionate employment either as a matter of course or in post above Class III and IV . we are also dismayed to find that the decision of this Court in **Sushma Gosain Vs. Union of India** has been misinterpreted to the point of distortion. The decision does not justify compassionate employment either as a matter of course or in employment in posts above Classes III and IV . In the present case, the High Court has rightly pointed out that the State Government's instructions in question did not justify compassionate employment in Class II posts. However, it appears from the judgment that the State Government had made at least one exception and provided compassionate employment in Class II post on the specious ground that the person concerned had technical qualifications such as M.B.B.S., B.E., B.Tech. etc. Such exception, as pointed out above , is illegal, since it is contrary to the object of making exception to the general rule. The only ground which can justify compassionate employment is the penurious condition of the deceased's family. Neither the qualifications of his dependant nor the post which he held is relevant."

24. It has been held by the Hon'ble Supreme Court in **Hindustan Aeronautics Ltd. Vs. A. Radhika Thirumalai 1996 (6) SCC 394 :-**

"7. In **Umesh kumar Nagpal Vs. State of haryana 1994 (4) SCC 138** it

has been indicated that the decision of **Sushma Gosain Vs. Union of India 1989 (4) SC 468** has been misinterpreted to the point of distortion and that the decision does not justify compassionate appointment as a matter of course. The observation on which reliance has been placed by the learned Single Judge in **Smt. Sushma Gosain**, after the death of her husband, who was working as storekeeper in the Department of Director General Border Road, sought appointment as Lower Division Clerk on compassionate grounds. In January 1983 she was called for the written test and later on for interview and had passed the trade test. She was, however, not appointed till January 1985 when a ban was imposed on appointment of ladies in the said Department. Having regard to these facts this Court has observed : (SCC p.470 para8)

*".....**Sushma Gosain** made an application for appointment as Lower Division Clerk as far back in November 1982. She had then a right to have her case considered for appointment on compassionate ground under the aforesaid government memorandum. In 1983, she passed the trade test and the interview conducted by the DGBR. There is absolutely no reason to make her wait till 1985 when the ban on appointment of ladies was imposed. The denial of appointment is patently arbitrary and cannot be supported in any view of the matter."*

25. In this case, there was no averment in the petition that there was vacancy. In view of the above proposition of law, supernumerary post cannot be created for the appointment of the petitioner's son.

26. Learned counsel for the appellant further contended that the petitioner is not entitled for the arrears of pay, pension and gratuity as the petitioner's husband had never worked in the department as a regular workcharge employee. He was merely a daily wager in the department . The husband of the petitioner was never been appointed as a temporary government servant in the department. It was further contended that her husband would not be entitled to any right to be absorbed or made permanent in the service either as temporary government servant or permanent government servant in view of the judgment passed in **Umadevi (supra)** by the Hon'ble Apex Court . It was further contended that the petitioner's husband had never acquired the status of temporary government servant , as such, he was not entitled to get pension and gratuity. It is not disputed that the services of the petitioner's husband had not been regularized and he had not acquired status of a temporary or permanent government servant . Learned counsel for the petitioner pointed out that her husband had worked in the department more than 10 years as a workcharge employee and as such he had acquired the statues of temporary government servant. In the service jurisprudence, a government servant may be a permanent or a temporary government servant. It is also essential under the scheme of the Constitution that the appointment so made for the temporary and permanent government servant must be in accordance with the Rules. If the appointments have not been made by following due procedure, it does not confer any right upon the claimant to seek any benefit under the Statue. It has been held in **Umadevi (supra)** that the daily

wagers have no legally enforceable right to be absorbed in the service and it is not the duty of the State to give them permanent appointment. The Hon'ble Supreme Court has also laid stress that the appointment dehors the Rules are nonest in the eyes of law. If these appointment had been made by not following due procedure it did not confer right upon them to be absorbed in the service. The employment of the persons in different services is governed by Rules made by the appropriate authorities. The strength of a service or a part of a service sanctioned as a separate unit is called the Cadre. Each cadre consists of a certain number of posts. A permanent post means a post carrying a definite rate of pay sanctioned without limit of time. In each cadre there may be and often is a hierarchy of ranks. Due to rush of business or other exigencies some " temporary posts " are often created . A temporary post means a post carrying a definite rate of pay sanctioned for a limited period. These temporary posts are usually for one year and are renewed from year to year, although some of them may be created for a certain specified period. The conditions of service of a government servant appointed to a post, permanent or temporary are regulated by the terms of the appointment, express or implied, and subject thereto, by the rules applicable to the members of the particular service. The appointment of a government servant to a permanent post may be substantive or on probation or on an officiating basis. A substantive appointment to a permanent post in public service confers normally on the servant so appointed a substantive right to the post and he becomes entitled to hold a "lien" on the post. It is quite clear that the appointment to a permanent post in a government servant , either on probation or a on an

officiating basis, is, from the very nature of such employment, itself of a transitory character and , in the absence of any special contract or special Rule regulating the conditions of the service, the implied term of such appointment, under the ordinary law of master and servant, is that it is terminable at any time. Thus, in the case of an appointment to a permanent post in government service on probation or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complain, any more than a private servant employed on probation or on an officiating basis can do . Likewise, an appointment to a temporary post in a government service may be substantive or on an officiating basis. In the absence of any special stipulation or any specific service rule, the servant so appointed acquires no right to the post. The substantive appointment to a temporary post, under the Rules, used to give the servant so appointed certain benefits regarding pay and leave, but was otherwise on the same footing as appointment to a temporary post on probation or on an officiating basis. The position of the daily wager is worse than a probationer or a person working as an officiating basis. He has not enforceable right even to seek the appointment if his service has been dispensed with . He cannot be termed as a temporary government servant .

27. It was further contended that Rule 5 of U.P. Pension Rules confers a right upon the temporary government servants , who have completed more than 10 years of service, to get the post retrial benefits. Learned counsel for the appellant also relied upon the definition of 'government servant' provided under the U.P. Government Servants Conduct Rules. Section 2 (b)

of the U.P. Governments Servants Conduct Rules provides as under:-

2(b) "Government servant" means a person appointed to public services and posts in connection with the affairs of the State of Uttar Pradesh.

Merely engagement as a daily wager dehors the statutory rules does not confer any right to be retained on public service .

28. In Umadevi (supra), it has been held that the appointment made dehors the rules would not confer any right to the claimant. It would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has been engaged or casually got employed should be directed to be continued permanently . By doing so , it will be creating another mode of public appointment which is not permissible. It has not been stated anywhere in the petition that her husband was appointed according to the Rules of the appointment made by the department in this behalf. Her husband was a daily wager workcharge employee and as such it cannot be held that he was legally appointed to a public service. We have already pointed out in the preceding paragraph with regard to the status of the daily wager, temporary and permanent government employee. In view of the above discussion, the petitioner's husband was not a temporary government servant. As such, the petitioner is not entitled to get pension and gratuity.

29. The petitioner had claimed the back wages of her husband. Leaned counsel for the petitioner has fairly conceded that the petitioner had not pleaded as to how much amount of back salary of her husband was due

against the department. The pleadings of the petitioner are vague on this point. The petitioner should have pleaded in precise the period and the amount of back salary which was due against the department so that the other party could have met with the said challenge. In view of the above , the petitioner is not entitled to get any back salary.

30. In view of the foregoing discussion, the Special Appeal deserves to be allowed and is hereby allowed. Therefore, the order dated 06.12.2003 passed in Writ Petition No. 2726(S/S)/2001 is set aside and Writ Petition No. 2726(S/S)/2001 is dismissed . Parties shall bear their own costs in both the courts.

(J.C.S. Rawat,J.)

(Rajeev Gupta,C.J.)

Dated 2nd December, 2006

LSR